

California

Board of Equalization
Legal Department-MIC: 82

Memorandum

To : Edward W. King, Chief
Fuel Taxes Division, MIC: 33

Date: August 21, 2006

From : Carolee D. Johnstone
Tax Counsel, MIC: 82

Telephone: (916) 323-7713
CalNet: 8-473-7713

Subject: . . . Inc./Exempt Bus Operator Application

In a memorandum dated March 8, 2006, you asked that my prior memorandum regarding the above-referenced taxpayer and the application of the Diesel Fuel Tax Law be reissued to reaffirm the analysis therein and to analyze, additionally, the application of the Use Fuel Tax Law. My prior memorandum, dated July 12, 2005, specifically addressed the question of whether . . . (Taxpayer) qualifies as an "exempt bus operator" with regard to any of the transportation services it provides pursuant to the contracts the Taxpayer has submitted in support of its application for exemption.

The legal opinions expressed in the July 12, 2005, memorandum are still applicable: Taxpayer qualifies as an Exempt Bus Operator for two of its five operations under the Diesel Fuel Tax Law, as discussed below. In addition, Taxpayer also qualifies for exemption for two of its five operations under the Use Fuel Tax Law, also discussed below.

Diesel Fuel Tax Law

Section 60039 of the Revenue and Taxation Code¹ defines the types of transportation services that do and do not qualify as an "exempt bus operation." Section 60039 provides, as is relevant to the transportation services provided by the Taxpayer:

(a) "Exempt bus operation" consists of the following:

[¶] . . . [¶]

- (2) Any private entity providing transportation services for the transportation of people under contract or agreement, except general franchise agreements, with a public agency authorized to provide public transportation services, only for diesel fuel consumed while providing services under those contracts or agreements"

[¶] . . . [¶]

¹ All future statutory references will be to the Revenue and Taxation Code unless stated otherwise.

- (4) Any common carrier of passengers operating exclusively on any line or lines within the limits of a single city between fixed termini or over a regular route, 98 percent of whose operations, as measured by total route mileage operated, are exclusively within the limits of a single city, and who by reason thereof is not a passenger stage corporation subject to the jurisdiction of the Public Utilities Commission.
 - (5) Any school district . . . owning, leasing, or operating buses for the purpose of transporting pupils to and from school and for other school . . . activities involving pupils, including, but not limited to, field trips and athletic contests.
 - (6) Any private entity providing transportation services for the purposes specified in paragraph (5) under contract or agreement with a school district . . . , only for diesel fuel consumed while providing services under those contracts or agreements
- (b) "Exempt bus operation" as defined in subdivision (a), shall not be applicable to a charter-party carrier of passengers. The term "charter-party carrier of passengers" has the same meaning as that specified in Section 5360 of the Public Utilities Code and shall further include those transportation services described in subdivisions (a) and (e) of Section 5353 of the Public Utilities Code, if that transportation service is rendered as contract carriage and not as common carriage of passengers." (§ 60039 [emphasis added].)

Further, an "exempt bus operator" is "any person that owns, operates, or controls an exempt bus operation." (§ 60040.)

With regard to transportation services Taxpayer provides under contract or agreement with each of the entities in question:

1. § : Metropolitan Transit District (Transit District), Taxpayer qualifies as an Exempt Bus Operator, pursuant to section 60039, subdivision (a)(2).
2. § Unified School District (School District), Taxpayer qualifies as an Exempt Bus Operator, pursuant to section 60039, subdivision (a)(5) and (6).
3. City of (City), it appears that Taxpayer does not qualify as an Exempt Bus Operator, pursuant to section 60039, subdivision (b), because the service is a charter-party carrier activity rendered as contract carriage and not common carriage.

4. [redacted], Inc. (formerly [redacted], Inc., dba [redacted]) (Broker), Taxpayer does not qualify as an Exempt Bus Operator, pursuant to 60039, subdivision (a)(2).
5. [redacted], Inc. (collectively, [redacted] Regional Centers), Taxpayer does not qualify as an Exempt Bus Operator, pursuant to 60039, subdivision (a)(2).

Transit District Contract

Transportation services provided by Taxpayer under contract with Transit District qualify as an "exempt bus operation" pursuant to section 60039, subdivision (a)(2). Taxpayer is a "private entity" that is "providing transportation services for the transportation of people" under a Professional Services Contract with Transit District. Transit District is a "public agency" which is "authorized to provide public transportation services."² However, it should be noted that this exemption is applicable only to the "diesel fuel consumed while providing services under" this contract. (§ 60039, subd. (a)(2).)

School District Agreement

Transportation services provided by Taxpayer under contract with School District qualify as an "exempt bus operation" pursuant to section 60039, subdivision (a)(6). Again, Taxpayer is a "private entity providing transportation services"; it provides these services under agreement with a school district, pursuant to the terms and conditions set out in a Purchase Order issued by School District. Pursuant to section 60039, subdivision (a)(5), the purpose of the services is to provide transportation for special education students to and from home and school (i.e., "door-to-door"). As noted above, this exemption is also applicable only to the "diesel fuel consumed while providing services under" this agreement. (§ 60039, subd. (a)(6).)

City Agreement

While transportation services provided by Taxpayer under agreement with City might otherwise qualify as an "exempt bus operation" under section 60039, pursuant to one or more of the definitions included in subdivision (a), Taxpayer does not qualify as an "exempt bus operation" under section 60039, based on the facts as we understand them, because it is a "charter-party carrier of passengers," rendering service as contract carriage and not as common carriage, pursuant to subdivision (b).

Under an agreement with City, Taxpayer is providing shuttle service between local Bay Area Rapid Transit (BART) and Caltrain stations and specific locations in City, according to a

² Whether Transit District is a "public agency" for purposes of section 60039 is not specifically addressed in the codes. However, where "public agency" is defined with respect to other public utility matters, the definition includes "a district." (See, e.g., Gov. Code, § 54999.1, subd. (c), and Pub. Util. Code, § 16871.) Therefore, it is reasonable to conclude that Transit District is a "public agency" for purposes of section 60039.

shuttle schedule and route map which are incorporated as part of the agreement.³ (Vendor Agreement, ¶¶ A. & 2.) It is our understanding that only persons who are employed by a designated group of employers, whose businesses are located in _____ in City, are served in accordance with Taxpayer's agreement with City. (Thus, it appears that the services are rendered as contract carriage, not common carriage.) According to this agreement, these employers have executed a consortium agreement to financially and otherwise support the "employer-based BART and Caltrain shuttle program." (See Vendor Agreement, ¶¶ B. & E. [designating these employers as "Participating Employers"].)

Section 60039, subdivision (b), quoted above, excludes from the definition of "exempt bus operation" any operation construed to be a "charter-party carrier of passengers," as defined by the Public Utilities Code, plus some operations that the Public Utilities Code excludes from the definition.

Section 5360 of the Public Utilities Code defines a "charter-party carrier of passengers" as "every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in [California]." Section 5353 of the Public Utilities Code excludes from the definition of "charter-party carrier of passengers" specific types of transportation services. As is relevant here, under most circumstances, "[t]ransportation service rendered wholly within the corporate limits of a single city or city and county and licensed or regulated by ordinance" would be excluded from the definition. (Pub. Util. Code, § 5353, subd. (a).)

However, for purposes of section 60039, subdivision (b), such a transportation service is declared to be a "charter-party carrier of passengers" that is not eligible as an exempt bus operation "if that transportation service is rendered as contract carriage and not a common carriage of passengers." (§ 60039, subd. (b) [emphasis added].) "Common carrier" is defined in the Public Utilities Code to mean "every person and corporation providing transportation for compensation to or for the public or any portion thereof, except as otherwise provided" and includes "[e]very passenger stage corporation' operating within this state." (Pub. Util. Code §§ 211 & 211, subd. (c).) There is no definition of "contract carriage" in the Public Utilities Code, but, in the Civil Code, "contract of carriage" is defined as "a contract for the conveyance of property, persons, or messages, from one place to another." (Civ. Code, § 2085.)

The transportation service provided by Taxpayer, pursuant to its agreement with City, appears to be "wholly within the corporate limits" of City and "licensed or regulated by ordinance" by City, which would normally not constitute a "charter-party carrier of passengers," pursuant to Public Utility Code section 5353, subdivision (a). However, this service is rendered as contract carriage, not common carriage, and, therefore, constitutes a "charter-party carrier of passengers" for purposes of section 60039, subdivision (b). Accordingly, the transportation services Taxpayer provides pursuant to its agreement with City do not qualify as an "exempt bus operation" under section 60039.

³ Exhibit "A," the "shuttle schedule and route map," is not included in the documents received from Taxpayer.

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4. Broker, Taxpayer does not qualify for exemption, pursuant to section 8655, subdivision (b)(2).
5. Regional Centers, Taxpayer does not qualify for exemption, pursuant to section 8655, subdivision (b)(2).

If you have any questions regarding any of the above information or would like to discuss these matters further, please give me a call.

cc: Louie Feletto (MIC:33)
Doug Shepherd (MIC:65)
Arlo Gilbert (MIC:33)
Todd Keefe (MIC:56)
Randy Ferris (MIC:82)